United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2072

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 76-2072

EDWARD MALLEY, JR.,

PETITIONER-APPELLEE

v.

THE STATE OF CONNECTICUT and
JOHN MANSON, COMMISSIONER OF
CORRECTIONS,

RESPONDENTS-APPELLANTS

B

P/S

RESPONDENTS' APPEAL FROM THE
JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF PETITIONER-APPELLEE

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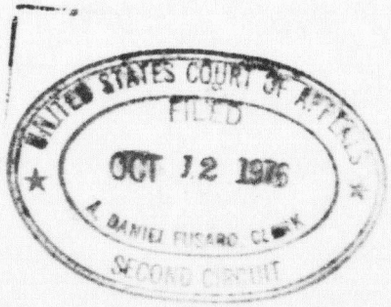

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STATEMENT OF THE CASE

Petitioner, Edward Malley, Jr., was charged in a three-count information with possession and hand-to-hand sale of a controlled drug (LSD) under §§19-480b and 19-481b of the Connecticut General Statutes. After entering a plea of not guilty, petitioner was tried to a jury and, after deliberating for approximately 12 1/2 hours, the jury returned a verdict of guilty on Counts One and Two, and not guilty on Count Three. Petitioner was sentenced to a term of not less than one (1) year nor more than two (2) years on the Second Count and for a term of one (1) year on the First Count with execution of the sentence on the First Count suspended.

Petitioner appealed his conviction to the Supreme Court of the State of Connecticut, in which appeal the petitioner assigned as error, inter alia, that the trial court had refused to strike and/or failed to give cautionary instructions as to the testimony elicited by the prosecutor and the arguments of the prosecutor and had denied defendant's motion to set aside the verdict because defendant was prejudiced by the actions of the prosecutor. These arguments

and others were briefed and argued to the state Supreme Court. Defendant specifically argued in his brief that his constitutional right to a fair trial was violated by the conduct of the prosecutor. The state Supreme Court, with one justice dissenting, affirmed the judgment of the trial court. Petitioner subsequently commenced this proceeding for a writ of habeas corpus and is presently on bail.

STATUTES AND TEXT CITED

CONNECTICUT GENERAL STATUTES

Sec. 19-480(b) PENALTY FOR ILLEGAL MANUFACTURE, SALE, PRESCRIPTION, ADMINISTRATION.

* * * * Any person who manufactures, sells, prescribes, dispenses, compounds, transports with intent to sell or dispense, possesses with intent to sell or dispense, offers, gives or administers to another person any controlled drug other than a narcotic drug or cannabis-type drug, except as authorized in this chapter, may, for the first offense, be fined not more than one thousand dollars or be imprisoned not more than two years or be both fined and imprisoned; and, for each subsequent offense, may be fined not more than five thousand dollars or be imprisoned not more than ten years, or be both fined and imprisoned. * * * *

Sec. 19-481(b) PENALTY FOR ILLEGAL POSSESSION.

* * * * Any person who possesses or has under his control any quantity of any controlled drug other than a narcotic drug, except as authorized in this chapter, may be fined not more than one thousand dollars, or be imprisoned not more than one year, or be both fined and imprisoned. * * * *

CONNECTICUT PRACTICE BOOK

Sec. 652 ERRORS CONSIDERED.

This court shall not be bound to consider any errors on an appeal unless they are specifically assigned and unless it appears on the record that the question was distinctly raised at the trial and was ruled upon and decided by the court adversely to the appellant's claim, or that it arose subsequent to the trial.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether it is reversible error, upon review of a grant of a petition for habeas corpus, for the district court judge to find no deliberate by-pass of state procedure and to take cognizance of petitioner's claim of a deprivation of his constitutional right to a fair trial despite the failure by petitioner's trial counsel to object contemporaneously to the questions and statements of the prosecutor as required by Connecticut state court procedure.

II. In the alternative, whether the trial judge correctly interpreted the Connecticut Supreme Court majority opinion to have ruled, on the basis of the trial record, that exceptional circumstances of deprivation of a fundamental constitutional right did not exist.

III. Whether the trial judge's finding that the prosecutor's remarks cumulatively amounted to a constitutional deprivation is supported by the facts of the case.

STATEMENT OF FACTS

The State's case at trial consisted primarily of the testimony of Officer Robert Laviana and Officer Richard Staebler, the undercover officers to whom Mr. Malley allegedly sold seven tablets of LSD on August 21, 1970. Mr. Malley, testifying on his own behalf, denied having seen the officers before and asserted an alibi defense removing him from the scene of the sale at the time testified to by the officers. To corroborate his own testimony, Mr. Malley offered testimony of an employee of a local stereo store and of an employee of a Waterbury insurance agency, neither of whom was related to or acquainted with the petitioner, to prove that he was present in one and then the other place of business of the times in question. According to this testimony, throughout the afternoon of August 21, Mr. Malley was engaged in claiming the loss by theft of an automobile cassette tape player from his car on August 20, 1970. The timing and sequence of events on the afternoon of August 21 were crucial to Mr. Malley's case.

During the course of the trial, the prosecutor made repeated reference to and persisted in attempting to introduce into evidence facts concerning the use of LSD on users and their families. On re-cross examination of Officer Laviana, defense counsel asked the witness if he was experienced with or experimented with the use of narcotics. The witness responded that he was not. Thereafter, on a re-direct examination, the prosecutor asked Officer Laviana if in response to defense counsel's inquiry as to the use of narcotics he had said he never used them. The witness responded, "That's right." Immediately thereafter, the following exchange occurred between the prosecutor and Officer Laviana:

Q. How about LSD, have you ever used that?

A. No, sir.

Q. You've seen people using these drugs, have you not?

A. I have seen people under the influence of it, yes, sir.

Q. You've seen what effects it has on them in their lives?

A. Yes, sir.

MR. McDONALD. Nothing further.

MR. MELLON. Your Honor, I think I'll object to the effect on their lives.

THE COURT. I'm going to let it stand. I think the objection should be timely made. Is there anything more of this witness?

(Supp. App. at 16.)

During the re-direct of the examination by Mr. McDonald of Officer Staebler, the following occurred:

Q. Mr./Mellon asked you if you were experienced or experimented with the use of narcotic drugs. Are you familiar with those people that have; have you seen people after using narcotic drugs?

A. Can I back up here a little bit on his question?

Q. Yes.

A. You're talking about--

MR. MELLON. Your Honor, I'll object to it. He's answered my question.

THE COURT. All right. At this point the objection is sustained.

Q. Have you ever used LSD?

A. No, sir.

Q. Heroin?

A. No, sir.

Q. Any of the narcotic drugs prohibited by the law?

A. No, sir.

Q. And you're familiar with some people that have?

A. Yes, sir.

Q. You've dealt in this area for some time as an undercover man?

A. Yes, sir.

Q. Seen the effects on their families?

MR. MELLON. I'll object to this, your Honor.

THE COURT. I'll allow him to answer this question yes or no.

Q. You're familiar with the effect of these drugs on the people that use them, their families?

A. Yes.

MR. MELLON. Objection.

THE COURT. Sustained.

(Supp. App. at 17-18.)

On direct examination, the defendant testified that he had never used narcotics and that all he knew about LSD was what he had read about it or seen on television. On cross-examination, the following exchange between the prosecutor and the defendant occurred:

Q. All right. Now, I think you told Mr. Mellon that you don't sell LSD.

A. That is right.

Q. Is that right?

A. Yes.

Q. Do you know what the price of LSD is in Waterbury on the street?

A. No, I don't. I have no idea.

Q. You have no idea what the price is?

A. No.

Q. And you told Mr. Mellon and told this jury that all you know about LSD is what you heard about it and seen on television?

A. Right.

Q. What you have read about it and seen on television?

A. Yes.

Q. You know it is a dangerous drug?

A. That is for sure.

Q. You know that it can cause permanent damage to people that use it, don't you?

A. I suppose it can. I wouldn't know. I never sampled it.

Q. You have read or seen about it on television, haven't you?

A. Yes, I have.

Q. It is a so-called psychedelic drug?

A. Yes, it is, I imagine.

Q. People have good or bad trips on it?

MR. MELLON. I will object to this.

MR. McDONALD. Mr. Mellon went into it.

THE COURT. I will allow it.

MR. MELLON. May an exception be noted?

THE COURT. Yes.

MR. MELLON. For this reason: I don't think he is an expert to testify.

THE COURT. If he doesn't know, he can say he doesn't know. He realizes that.

By Mr. McDonald:

Q. You know that people can have bad trips on LSD. You have heard that.

A. I have seen it on television.

Q. And they can go off?

A. I have read different articles about it, where something like that happened.

Q. You wouldn't have anything to do with selling that to young people, would you?

A. I wouldn't sell it to anybody.

Q. You know it is deadly stuff, don't you?

A. It sure is.

(Jt. App. at 40A-41A; Supp. App. at 18-20.)

The prosecutor made the following statements to the jury in his summation:

Ladies and Gentlemen of the Jury:

The basic issue I submit in this case is whether you believe the police officers or whether you believe this accused, Mr. Malley. The police officers have testified here before you. They have blown their cover. They come in here and testify before you, two excellent trained investigators, undercover men who, you heard their testimony, purchased over a hundred various items of heroin, LSD, and other controlled drugs. They have come in and we have lost them as undercover men due to this case, but we put them on here as witnesses before you, because this LSD problem and the sale of it is such a serious offense.

* * *

This question of the use of these psychedelic or hallucinagenic [sic] drugs has inflamed our country and has put many of us to asking questions about the use of this drug by our young people.

We often hear the expression the drug scene. And when we think of the drug scene, we think of what we see on television, what we hear about, the group in Greenwich Village, young people dressed in hippie style using marijuana, LSD, speed, some one of these other drugs who turn on, but that is not the drug scene as you have seen it here portrayed before you twelve people on this jury.

What you have seen here is the sale of seven little tiny pills for $25, almost $3.60 apiece. That is a commercial business and it is designed to destroy the youth of our country and it is doing so. And it is carried on by men like Mr. Malley who sell indiscriminately, so indiscriminately that once in a while they make a mistake and they sell to two bearded, funny, easy to get along with fellows that drive around in an old car....

Now, with respect to this drug scene, there are few people fighting it and a few of them are the two that testified here. There aren't many others, and we have lost them due to this trial.

* * *

Now, ladies and gentlemen of the jury, as Mr. Mellon says, you have a serious and solemn responsibility here to decide the guilt or innocence of this accused. You also have a serious responsibility to society for, as has been said many years ago, 'To let the guilty go free is to do thereafter with their hands all the crimes they may subsequently commit.'

You ladies and gentlemen of the jury are aware of the problem in our society caused by drugs. This is your opportunity to return a verdict that reflects that concern. The State has submitted direct eyewitness evidence of police officers in respect to this man, and we respectfully suggest that the only verdict possible in this case is a verdict of guilty.

Thank you.

(Jt. App. at 38A-39A.)

The jury then deliberated for a total of approximately 12 hours, during which they requested that the testimony of one undercover officer and the insurance company employee be read to them before

returning a verdict of guilty. (Jt. App. at 37A, 47A.)[1]

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[1] In his Memorandum of Decision, Judge Blumenfeld twice refers to the time of jury deliberation. He first refers to seven hours of deliberation (Jt. App. 37A), which is not correct. However, later in the Memorandum, at footnote 12, he correctly refers to "the 12 hour deliberation time in this case." (Jt. App. at 47A).

ARGUMENT

I. INTRODUCTION

Consistent with the function of a federal court in a habeas corpus review of a state court conviction, the trial judge undertook an independent analysis of the two separate issues presented herein. He first concluded that the questions and remarks of the prosecutor so prejudiced the case as to deny the defendant a fair trial within the meaning of the due process clause of the Fourteenth Amendment and further denied him the right of confrontation of adverse witnesses. Having determined that the petitioner had been denied a fundamental constitutional right, the district court judge ruled that the petitioner had not deliberately by-passed his opportunity to litigate the constitutional issue in state court. The judge applied the standard for "deliberate by-pass" set forth in Fay v. Noia, 372 U.S. 398, 439 (1963), derived from the longstanding definition of waiver formulated in Johnson v. Zerbst, 304 U.S. 485, 464 (1938), and ruled that the facts do not support "an intentional relinquishment or abandonment of a known right or privilege." (Jt. App. at 49A.) The trial

court reasoned further that consideration of the constitutional issue was appropriate even absent a finding of no deliberate by-pass, since the Connecticut Supreme Court, applying the judicial exception permitting review in circumstances of deprivation of a fundamental constitutional right despite failure to object, had found no such exceptional circumstances and, therefore, refused to reverse on the ground of the prejudicial effect of the prosecutor's conduct. This latter view of the state court's decision independently supports the district judge's discretion to reach the merits of the constitutional claims.

Assuming the Connecticut Supreme Court premised its affirmance upon a finding of procedural default and waiver of the opportunity to object, the federal trial judge nevertheless acted within his discretion in finding no deliberate by-pass on the facts, since waiver affecting federal rights is a federal question. Fay v. Noia, 372 U.S. 398, 438 (1938); see Estelle v. Williams, _____ U.S. _____, 48 L.Ed. 2d 126, 143 (1976) (Brennan, J., dissenting). The issue upon review is to determine whether the trial judge

correctly assessed the facts bearing upon waiver, and, if so, whether his finding of constitutional deprivation also is proper. Alternatively, if the state Supreme Court opinion can be read to have found no constitutional deprivation demonstrated by the record, regardless of a procedural default, then the issue of waiver is immaterial here, and the only question is whether the federal trial judge was correct in ruling that the prosecutor's questions during examination and statements in closing argument so prejudiced the rights of the accused as to affect the outcome of the trial, requiring issuance of the writ.

II. THE EFFORTS OF THE PROSECUTOR TO INFLAME THE PREJUDICES OF THE JURY CUMULATIVELY RESULTED IN THE DEPRIVATION OF A CONSTITUTIONAL RIGHT AND DENIAL OF A FAIR TRIAL.

The district judge correctly recognized, as he must, that the trial record is replete with attempts by the prosecutor to introduce facts in a manner not in accordance with the rules of evidence and calcu-

lated to turn the jury against the accused for reasons unrelated to the commission of the crime charged. As the trial court found:

> ...the transcript discloses an effort on the part of the prosecutor to inflame the prejudices of the jury at every possible opportunity by: 1) introducing extraneous and irrelevant evidence concerning the effects of drugs on users, especially minors, and their families; 2) intimating, without any evidentiary support, that the petitioner had been involved in a number of earlier drug transactions for which he had not been brought to justice; 3) inveighing against the 'drug culture' and implying, again without evidentiary support, that the petitioner was in some way connected with it; and 4) attempting to bolster the agents' credibility with the unsupported assertion that the State had considered the case important enough to 'sacrifice' the future ability of the agents to operate by 'blowing their cover' and having them testify at trial.

(Jt. App. at 42A-43A.)

The district court judge recognized the "self-evident" prejudice of the prosecutor's statement expressly involving defendant Malley in "a commercial business" of indiscriminate drug sales "designed to destroy the youth of our country and it is doing so." (Jt. App. at 43A.) This assertion of defendant's selling of drugs to minors is totally without factual

support in the record and clearly goes beyond the prejudice this Court found sufficient for reversal on grounds of fundamental fairness in United States v. Bugros, 304 F2d 177 (2d Cir. 1962), where the prosecutor had referred pointedly to a fact in the record to imply that the defendant had hidden narcotics where a child readily could have discovered them.

In the instant case, the prosecutor further injected prejudice by implying previous drug sales by the defendant for which he was not apprehended. The prosecutor stated in argument:

> But something went wrong with Mr. Malley this time because the men [the undercover agents] came into Court and testified before you ladies and gentlemen of the jury....

(Jt. App. at 44A; Supp. App. at 21.) Again, absolutely no reasonable deduction can be drawn from any fact in the record involving Malley with prior drug sales. The prosecutor was not arguing inferences based on record evidence; he was in fact testifying and manufacturing the evidence. Compare United States v. Morell, 524 F2d 550, 557 (2d Cir. 1975) (prosecutor's statement that government witness travelled a long distance to testify voluntarily was

based upon inference adduced at trial); United States v. Canniff, 521 F2d 565, 571 (2d Cir. 1975) (characterizations by prosecutor based upon record evidence, rather than personal opinions).

Not only did the prosecutor exceed the bounds of the record, but both in his summation and persistently during his examination of witnesses, he sought unduly to inflame the jury's sensitivity to the "drug scene" and the harmful effect of drugs on people and their families. During the re-direct examination of each of the two undercover officers, the prosecutor attempted to elicit opinions as to the effect of LSD upon the lives of users. (Supp. App. at 16-18.) There was no probative value in this testimony relating to the guilt or innocence of the accused. It only could have been a calculated effort to play upon any prejudices the jurors might have toward those people who sell drugs "indiscriminately" and thereby destroy the lives and families of their customers to the commercial benefit of the seller.

Beyond this element of destruction of lives for profit, the prosecutor introduced the "hippie," "Greenwich Village" "drug scene" as a problem whose solution was within the reach of the jury by arriving at a verdict of guilty. (Jt. App. at 38A-39A.) As the trial court noted, "[t]his tactic of associating a defendant with an unpopular or feared group and then inviting the jury to convict him as an exhibition of their feeling toward the group has moved courts in several instances to set aside the resulting verdicts. United States ex rel. Haynes v. McKendrick, 481 F2d 152 (2d Cir. 1973) (appealing to racial prejudice); Perry v. Mulligan, 399 F. Supp. 1285 (D.N.J. 1975) (trial is of "all corrupt officials")." (Jt. App. 44A-45A.)

There is absolutely no proper purpose for these statements by the prosecutor or justification for his conduct in the context of other events of the trial. While the prosecutor properly might have called attention to the well-recognized "drug problem" to emphasize the importance of any such

case,[2] he clearly exceeded any reasonable limit by eliciting irrelevant facts, creating facts of his own, and engaging in speculation and innuendo intentionally to evoke distaste for the defendant because of his involvement in the alleged activity. The intensity of the prosecutor's effort was in no way a provoked, tactical response to similar abusive conduct by the defense.[3] Rather, it was an intentional effort to

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[2]See United States v. Wilner, 523 F2d 68, 73 (2d Cir. 1975) (dispassionate reference to "problem of drugs" supported by evidence in record as to amount of illegal importation of marijuana); United States ex rel. Maisonet v. LaVallee, 405 F. Supp. 925, 927 (S.D.N.Y. 1975) (general reference to harm to society from continued violations of drug laws; no derogatory association of defendant).

[3]The district court found that defense counsel's reference to the "drug problem" in his closing argument, rather than an invitation to the prosecutor, as claimed by the State, "was an attempt to parry the prosecutor's continuous attempts to try the 'drug problem' rather than the defendant." (Jt. App. at 47A).

The instant case is unlike United States v. Estremera, 531 F2d 1103, 110 (2d Cir. 1976), in which this Circuit recently refused to reverse the conviction of a defendant when any improper remarks by the prosecutor were made in "direct response" to improprieties on the part of defense counsel, which the Court found to be a factor in measuring the permissible limits of the government's summation. Id.; compare United States v. Gonzalez, 488 F2d 833, 836 (2d Cir. 1973) (reversal on grounds of repeated pattern of misconduct by prosecutor unprovoked by defendant).

turn the jury against the defendant for reasons other than the weight of the properly adduced evidence.[4]

Of particular prejudice to Mr. Malley were the prosecutor's attempts to buttress the testimony of the undercover agents upon which the state rested its entire case. He argued that:

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[4]The court below found that these "tactics violate the standards adopted by the American Bar Association Project on Standards for Criminal Justice, which state:

> 5.8(c) The prosecutor should not raise arguments calculated to inflame the passions or prejudice of the jury.
>
> 5.8(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the prevailing law, or by invoking predictions of the consequences of the jury's verdict.

Standards Relating to the Prosecution Function and the Defense Function, Approved Draft (1971)." (Jt. App. at 45A.) See also Berger v. United States, 295 U.S. 78, 88 (1935).

> The police officers have testified before you. They have blown their cover. They come in here and testify before you, two excellent trained investigators, undercover men who, you heard their testimony, purchased over a hundred various items of heroin, LSD and other controlled drugs. They have come in and we have lost them as undercover men due to this case, but we put them on here as witnesses before you, because this LSD problem and the sale of it is such a serious offense.

(Jt. App. at 38A; Supp. App. at 21.) In addition to the effect of this statement placing an unfair burden on Mr. Malley's constitutional right to confront the witnesses against him, discussed infra, the effort to tip the crucial balance of credibility toward the government by the further introduction of purported facts, in "the absence of any evidence in the record to support such a statement," (Jt. App. at 46A)[5] in itself warranted issuance of a writ of habeas corpus.

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[5] In its brief in the instant case, at 20, the State argues that the statement that the agents were "lost" because of their testimony is supported by evidence in the record, and "[t]hat their testimony compromised them was apparent to the jury without comment by the prosecutor." This assertion is contrary to the factual finding of the trial judge, and disregards the undue, improper emphasis on the "loss" by the prosecutor. The prosecutor cannot be said merely to have summarized and articulated implications in the record; he went out of his way to point out the State's stake in the case and the supposed trade-off between the anonimity of the agents and the conviction of Mr. Malley.

When evaluated cumulatively, as did the trial court, there can be no doubt that the prosecutor's remarks were intended to inflame the jury both in examination and summation, and violated Mr. Malley's constitutional right to a fair trial as guaranteed by the due process clause of the Fourteenth Amendment, measured by the standard of fundamental fairness. United States ex rel. Castillo v. Fay, 350 F2d 400, 401 (2d Cir. 1965); cert. denied, 385 U.S. 1019 (1966). United States ex rel. Haynes v. McKendrick, 350 F. Supp. 990, 995 (S.D.N.Y. 1972), aff'd 481 F2d 152 (2d Cir. 1973).

This test of fundamental fairness for collateral attack on petitions for writs of habeas corpus has been propounded by the United States Supreme Court in Donnelly v. DeChristoforo, 416 U.S. 653 (1974), wherein the Court held that remarks by a state court prosecutor were not "so fundamentally unfair as to deny [the defendant] due process." 416 U.S. at 645. The DeChristoforo case involved a trial and conviction in a Massachusetts court for first degree murder. The defendant was tried jointly with a co-

defendant who, after the close of evidence but before final argument, elected to plead guilty to a charge of second degree murder. The defendant did not seek an instruction that the jury was to draw no inference from the changed plea, nor was one given. During the prosecutor's summation, which the Supreme Court characterized as "rather lengthy," the prosecutor made two remarks which were alleged to have deprived the defendant of a fair trial. The first, to which the Court gave short shrift, concerned a single remark, "I honestly and sincerely believe that there is no doubt in this case, none whatsoever." Id. at 640 n. 6. The second remark deemed "more serious" by the lower court, was aimed at the defendant's motives in standing trial: "They [the defendant and his counsel] said that they hope that you find him not guilty of something a little less than first degree murder. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder." Id at 640.

The Court rejected the finding of the Court of Appeals that "the prosecuting attorney turned [the co-defendant's] plea into a telling stroke against [DeChristoforo]," Id. at 643, and stated that it was not "even probable" that a jury would draw the unfavorable inference. Moreover, the Court stressed

that the "trial court took special pains to correct any impression that the jury could consider the prosecutor's statements as evidence in the case." Id. at 644. The Court noted that the judge "reemphasized" the point that such remarks were not evidence after the prosecutor had made a similar statement. The judge also directed his attention to the particular remark and admonished the jury to ignore it. Furthermore, the Court characterized the prosecutor's remark as "admittedly ambiguous" and as but "one moment in an extended trial...followed by specific disapproving instructions." Id. at 645.

The DeChristoforo opinion is readily and completely distinguishable from the case at hand, and the distinctions further demonstrate the denial of fundamental fairness in the case at hand. First, the prosecutor's remarks in this case were far more extensive and deeply prejudicial than the remarks of the prosecutor in DeChristoforo. There was absolutely no "ambiguity" in any of the pointed remarks quoted above concerning the testimony of the undercover agents or in the thrust of the leading questions of the prosecutor concerning drug use. These statements

only could have been intended to and had the effect of persuading the jury that a conviction in this case would be a blow against the "drug scene" and that the state's alleged loss of two undercover men was a price so dear that conviction was required, or else the state's narcotics enforcement would collapse, if it had not already done so, as a result of defendant having exercised his right to confront these witnesses. Second, there were no cautionary statements by the prosecutor that his statements in his summation were not evidence; nor can it reasonably be assumed from the record that these remarks were made casually, or in a passing manner. Most importantly, these remarks, like those made in examining the witnesses, cannot possibly be characterized as "a few brief sentences in the prosecutor's long and expectably hortatory closing argument...." Id. at 647. The prosecutor's explicit reference to the "loss" of the agents twice during his summation belies any characterization of the statements as passing remarks lost in the entirety of the trial. Nor does the context of these remarks alter their

their import or justify them. Third, the trial court in the instant case did not admonish the jury to disregard the irrelevant and prejudicial remarks in the summation. Nor did the court even instruct the jury that remarks of counsel are not evidence.[6] See Camp v. Arkansas, 404 U.S. 69 (1971) (per curiam), reversing, 249 Ark. 1075, 467 S.W. 2d 707 (1971).

Under the facts of this case, there is little room for disagreement that the unfairness resulting from the prosecutor's remarks had an appreciable impact upon the outcome of the case. While, as the trial court recognized, absolute certainty on this issue is impossible, it is fair to state that the

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[6] The court stated in its charge to the jury:

> "The opinions of either counsel as stated to you in their arguments are in no way binding upon you in determination of the facts, although you should weigh the arguments of the attorneys as to the facts. It is your recollection of the evidence that controls, not mine, or not that of the attorneys, but your recollection controls."

(Jt. App. at 10A.) These remarks, rather than stating that counsel's remarks were not evidence, tended on the contrary to suggest that they might be evidence, as the court stated that the remarks of counsel were not "binding" as to what were the facts.

case against Mr. Malley was indeed a close one. The testimony of the defendant and of the disinterested alibi witnesses, as well as inconsistencies in the testimony of the undercover agents with respect to the time of the alleged sale and the defendant's automobile license number, raise a serious doubt as to whether Mr. Malley was present at the alleged sale. (Jt. App. 46A-47A.)

This Circuit has stated that "probability of prejudice we believe to be the correct test when evidence of guilt as in this case is not overwhelming." United States ex rel. Haynes v. McKendrick, 481 F2d 152, 159 (1973). In such a close case as this one, the prosecutor's efforts to inject extraneous, prejudicial elements into the record assume substantial importance. United States v. Burse, 531 F2d 1151, 1155 (2d Cir. 1976) (closeness of case in light of alibi defense calls for reversal for prosecutorial misstatement); see United States v. Chrisco, 493 F2d 232, 237 (8th Cir.), cert. denied, 419 U.S. 847 (1974). Moreover, when credibility of the witnesses is such a vital factor in weighing the evidence, the effect of

the prosecutor's statements provoking contempt for the accused, who testified on his own behalf, and fortifying with extra-record evidence the verity of the testimony of the undercover agents renders the probability of prejudice so great that there is simply no justification for assuming its nonexistence. See United States v. Herrera, 531 F2d 788 (5th Cir. 1976) (prosecutor's vouching for truthfulness of government agents, considered cumulatively with earlier statements, required reversal where verdict turned on credibility). The fact that the jury deliberated for approximately 12 hours and requested a reading of the testimony of one officer and one alibi witness should remove any possible doubt that the prosecutor's improper remarks had some impact upon the jury's consideration of the case.

Not only did the prosecutor's conduct violate petitioner's right to due process and a fair trial, but the trial court found that it also effectively vitiated the petitioner's fundamental Sixth Amendment rights to a trial and to confront the witnesses. (Jt. App. at 46A.) The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..., [and] to be confronted with the witnesses against him....

In Davis v. Alaska, 415 U.S. 308, 315-316 (1974), the Court stated:

> Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination,' Douglas v. Alabama, 380 U.S. 415 (1965)...Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."

The purpose of cross-examination is totally defeated if opposing counsel in his summation is permitted, through the introduction of irrelevant hypotheses having no support in the evidence, to buttress the credibility of prosecution witnesses by appeals to the jury's natural desire to punish the alleged wrongdoing and to maintain the integrity of the police's investigatory apparatus. As the Supreme Court stated in Bruton v. United States, 391 U.S. 13, 128 (1960), these statements added "substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination." In Frazier v. Cupp, 394 U.S. 731, 736 (1960), the Court acknowledged that

"[i]t may be that some remarks [of the prosecutor] included in an opening or closing statement could be so prejudicial that a finding of error, or even [Sixth Amendment] constitutional error, would be unavoidable." In Frazier, the Court declined to hold that the prosecutor's conduct (i.e., summarizing defendant's expected testimony and referring during his opening statement to a paper he was holding to refresh his recollection about what the defendant had said before trial) constituted a violation of defendant's right to cross-examination, even though the defendant subsequently exercised his Fifth Amendment privilege against self-incrimination when called to the stand. The Court so held in view of the obliqueness of the prosecutor's reference and the short-lived nature of the allegedly objectionable conduct, and in view of the judge's cautionary instruction that the prosecutor's opening statement was not evidence. Id. at 735.

The same limiting qualifications cannot be applied in this case. The basic issue here turned, in the prosecutor's own words, on "whether you believe the police officers or whether you believe this accused, Mr. Malley." (Jt. App. at 38A.) The credibility of

the agents' testimony was, therefore, a vitally important part of the prosecution's case. As the Court remarked in Frazier, supra, at 736:

> At least where [the objectionable statements are] not touted to the jury as a crucial part of the prosecution's case, 'it is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately.' United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 239 (1940).

The right of confrontation is the right of "effective confrontation." Douglas v. Alabama, 380 U.S. 415, 419 (1965). Even assuming the relevance of the prosecutor's references herein to the "loss" of these undercover agents, the defendant was denied his right of "effective confrontation" because he was unable to test the prosecutor's hypothesis that these agents could not continue working in their former capacity. Justice Bogdanski, in a vigorous dissent in the Supreme Court of Connecticut, aptly characterized the prosecutor's argument as follows:

> These comments by the prosecutor were totally gratuitious and uncalled for. There was no evidence that the undercover agents were prevented from working in other geographic areas. There was no evidence that the disclosure of their names would affect their ability to continue as undercover agents. The effect of these comments was to prejudice the jury against the defendant for exercising his constitutional rights to a trial by jury and to confront the witnesses against him. U.S. Const. amend. VI; Conn. Const. art 1 §8. The state's attorney's account of why the officers were put on the stand was misleading. They testified not for the reasons given by the state's attorney, but because the defendant had a right to confront his accusers. The comment that the state lost them due to this trial was wholly unwarranted. Moreover, the comment that 'something went wrong with Mr. Malley this time' could only lead the jury to speculate that past criminal conduct on his part had gone unpunished.

State v. Malley, 167 Conn. 379, 391, 355 A2d 292, 298-299 (1974) (Bogdanski, J., dissenting); (Jt. App. at 27A); compare Parker v. Gladden, 385 U.S. 363 (1966).

III. THE DISTRICT COURT JUDGE PROPERLY EXERCISED HIS DISCRETION TO REACH THE FEDERAL CONSTITUTIONAL ISSUES BECAUSE PETITIONER HAD NOT DELIBERATELY BYPASSED HIS RIGHT TO OBJECT AS A MATTER OF FEDERAL LAW.

As one ground for its refusal to consider Mr. Malley's claim of error on appeal, the Connecticut

Supreme Court found procedural default by the defendant for his failure to object contemporaneously to the questions and statements of the prosecutor,[7] which the federal district court found to constitute a constitutional deprivation. The court below correctly recognized that Mr. Malley's habeas petition did not present an issue of exhaustion, since the constitutional arguments were fully presented to the state Supreme Court. (Jt. App. at 48A.) Rather, properly framed, the issue is whether the procedural default found by the state Supreme Court should be upheld against federal constitutional challenge because the petitioner deliberately by-passed the state procedures for litigating the objections which give rise to the constitu-

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[7] Connecticut Practice Book §652 (1963). Errors Considered.

> This court shall not be bound to consider any errors on an appeal unless they are specifically assigned or claimed and unless it appears on the record that the question was distinctly raised at the trial and was ruled upon and decided by the court adversely to the appellant's claim, or that it arose subsequent to the trial.

(Jt. App. 23A, 48A.)

tional claim. See Fay v. Noia, 372 U.S. 398, 433 (1963). If so, then the petitioner may not successfully attack his state conviction in federal court.

The standard for "deliberate by-pass" continues to be "the intentional relinquishment or abandonment of a known right or privilege." Fay v. Noia, supra at 439; see Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Furthermore, the Supreme Court has expressed its disfavor of inferred waivers of constitutional rights. See Barker v. Wingo, 407 U.S. 514, 525-26 (1972); Estelle v. Williams, _____ U.S. _____, 48 L.Ed. 2d 126, 137 (1976) (Powell, J., concurring).

The record currently before the court simply does not support a finding of deliberate by-pass under the controlling standard. The court must keep in mind that the constitutional rights in question are the right of confrontation and, most importantly, the right to a fundamentally fair trial. Failure to object to the remarks of the prosecutor which permeated the entire trial cannot be considered a choice made by the accused himself, knowing of the

prejudicial impact of the remarks on his decision to go to trial, and presumably to receive a fair one. See Fay v. Noia, 372 U.S. 391 (1963). Nor can the passiveness of Mr. Malley's trial counsel reasonably be characterized as deliberate trial strategy to gain some advantage with the jury, by which Mr. Malley should be bound. See Henry v. Mississippi, 379 U.S. 443 (1965). On the contrary, as the district court found, "it is inconceivable that any individual, having chosen to go to trial, could elect to waive his right to a fair one." (Jt. App. at 49A.)

The reasoning of two recent Supreme Court cases dealing with the issue of waiver underscore the applicability of the Noia standard to this case to arrive at a finding of no deliberate by-pass. In Estelle v. Williams, _____ U.S. _____, 48 L.Ed. 2d 126 (1976), the Court held that the absence of compulsion for the habeas petitioner to wear prison garb at his state trial precludes a finding of denial of due process for the prejudicial appearance of such garments before the jury. The Court dismissed

the waiver issue in the context of whether the petitioner had made a free and conscious decision to proceed to trial in prison clothing. 48 L.Ed. 2d at 134. The petitioner clearly did not lack appreciation of the issue, because he had raised the question of clothing with the jail attendant prior to trial. Id. Also, the trial judge was aware that the defendant's counsel was fully conscious of the situation due to counsel's mention of petitioner's attire during voir dire, raising the reasonable inference that the choice of prison garb was a tactic designed to elicit jury sympathy. 48 L. Ed. 2d at 134 and n. 5. Thus, there was substantial factual support for a conclusion that petitioner had considered the problem of clothing and had deliberately proceeded in prison attire, with the possibility that it might work to his benefit.

In the instant case, there is no such support for any inferences that the petitioner appreciated the effect of the prosecutor's statements and questions upon his right to a fair trial and to confront

witnesses. Nor could the trial judge have had any basis to assume that petitioner's counsel was engaging in a tactic to evoke jury sympathy or otherwise gain some advantage. Failure to object to the prosecutor's remarks in no way could have benefitted Mr. Malley's case. He had a strong alibi defense, which, if weighed by the jury under the standard of reasonable doubt without the extraneous, prejudicial considerations introduced by the prosecutor, presented the substantial possibility of acquittal. To impute to the defendant or his counsel the motive of subverting the trial process in the hopes of obtaining an acquittal in spite of the prosecutor's remarks, or, if convicted, of challenging the prosecutor's conduct on appeal or by habeas corpus, would be reaching too far to uphold the asserted interest of the State in contemporaneous objections. The risk of this approach would have been too high in light of the strength of Mr. Malley's case if presented to the jury solely upon facts properly adduced. The district court below properly did not undertake to grasp for straws to uphold a purported state interest in the absence

of any direct or circumstantial indication of deliberate failure to object by the petitioner, particularly in view of the indefensible conduct of the prosecutor. In the circumstances of this case, a finding of waiver as the result of an alleged procedural default would serve only to remove any deterrent value collateral attack may have against prosecutorial excess[8] and effectively contribute to the subversion of the state's interest in an orderly and fair proceeding, to say nothing of the petitioner's paramount right to a fair trial under the Con-

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[8]Even more recently than Estelle v. Williams, the Supreme Court ruled that a habeas petitioner could not invoke the exclusionary rule as the basis for a constitutional attack on his state court conviction, ruling that the function of the rule to deter unlawful police activity is served adequately by restricting its application to the state trial and subsequent appeals. Stone v. Powell, 44 U.S.L.W. 5313 (U.S. July 6, 1976). The exclusionary rule is a judicial device formulated to address the problem of excesses in law enforcement, and is subject to judicial limitation as long as the Fifth Amendment is upheld in some manner. Denial of the right to a fundamentally fair trial or to confrontqation of witnesses resulting from prosecutorial misconduct can be deterred only by setting aside convictions tainted by such conduct, and habeas corpus attack on such convictions should be available and vigorously upheld as long as the writ continues to exist.

stitution. See Camp v. Arkansas, 404 U.S. 69 (1971) (per curiam), reversing, 249 Ark. 1075, 467 S.W.2d 707 (1971).

In the companion case of Francis v. Henderson, ____ U.S. _____, 48 L.Ed. 2d 149 (1976), the Supreme Court affirmed the Fifth Circuit's ruling that a defendant may not collaterally attack his state court conviction for the allegedly unconstitutional composition of the grand jury when no objection had been made prior to trial. Because of the particular body of law surrounding timely challenges to grand jury composition,[9] the holding of Francis should not be extended beyond that situation, and the showing of

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[9] Francis v. Henderson was decided under the controlling standard of the Louisiana Code of Criminal Procedure, which required all objections to a grand jury to be raised before the expiration of the third judicial day following the end of the grand jury's term or before trial, whichever was earlier. 48 L.Ed. 2d at 152 n. 1. In Francis, the Court relied heavily on the reasoning of Davis v. United States, 411 U.S. 233 (1973), which interpreted the requirements for post-conviction attack of a grand jury under Rule 12(b)(2) of the Federal Rules of Criminal Procedure in a proceeding under 28 U.S.C. §2255.

"cause" required for collateral review following a defendant's failure to object to a state statutory pretrial procedure cannot properly be applied here. To do so effectively would overrule the Noia standard of deliberate by-pass, which the Supreme Court clearly did not intend in Francis as a general matter. However, even if the showing of "actual prejudice" to the petitioner from the objectional procedure, further required in Francis, were applicable to this case, which again it is not, the closeness of the instant facts and the importance of the balance of credibility in the jury's deliberation must be deemed sufficient for such a showing in this case.

IV. A FINDING OF NO DELIBERATE BY-PASS IS UNNECESSARY BECAUSE THE STATE SUPREME COURT RULED ON THE MERITS OF PETITIONER'S CONSTITUTIONAL CLAIM.

The district court found it "unnecessary to rely solely on a holding that there was no deliberate by-pass, since the Connecticut Supreme Court did in fact address the petitioner's constitutional claims on the merits, at least to the extent that they are

reviewable in this court." (Jt. App. at 50A.) The state Supreme Court enunciated two circumstances in which it will consider newly raised claims. The first is not relevant to this case. As to the second, the court stated:

> The second 'exceptional circumstance' may arise where the record adequately supports a claim that a litigant clearly has been deprived of a fundamental constitutional right and a fair trial. The record in the case before us does not disclose that the defendant has established the existence of either of the two 'exceptional circumstances' that would justify our consideration of claims not raised at the trial level.

State v. Malley, 167 Conn. 379, 387-88, 355 A2d 292, 297 (1974) [emphasis added]. (Jt. App. at 24A.)

The only logical reading of the state court opinion that does not render superfluous the language underscored in the above excerpt is that the court must have considered whether the record supported the claim of denial of the defendant's constitutional rights.[10] Such consideration is a prerequisite

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[10] In dissent, Justice Bogdanski undertook extensive consideration of the constitutional issue to arrive at the conclusion that the defendant was denied his fundamental right to a fair and impartial trial. State v. Malley, 167 Conn. 379, 390-92, 355 A2d 292, 297-99 (1974) (Bogdanski, J., dissenting) (Jt. App. at 28A.)

for the court to reach the conclusion it did. The exception is itself a rule of state procedure governing the consideration on appeal of federal constitutional claims. The existence of this rule for purposes of federal habeas corpus review renders unnecessary a finding of no waiver whenever a petitioner at least raises the constitutional issue for state Supreme Court consideration, and the court indicates in some manner that it rejects the claim on the ground that the denial of fundamental fairness is not indicated by the record before it. This is not an unreasonable approach, since it is the state Supreme Court itself which has supplemented the Practice Book rule regarding contemporaneous objections with the exceptional circumstances exception requiring consideration of the record to determine whether the exception applies. If the state court determines it does not apply, and thus rules that the defendant has not been denied his federal constitutional right to a fair trial, the question is then open for full

consideration by a federal court in habeas corpus, since the claim presents a federal question. The state might argue that this approach erodes the contemporaneous objection rule stated in the Practice Book, but indeed the approach is required by the circularity of the "exception" engrafted upon the rule by the Connecticut Supreme Court, by which the state must be bound.

V. CONCLUSION

Regardless of this Court's interpretation of the consideration given to Mr. Malley's appeal by the Connecticut Supreme Court, the district court judge below was clearly within his discretion to review the merits of the petitioner's constitutional claims upon a petition for habeas corpus. On the merits of those claims, petitioner was denied due process of the law and his Sixth Amendment right to an impartial jury and to effective confrontation of adverse witnesses. The statements and remarks of the prosecutor on examination and summation were calculated so to inflame the jury by the introduction of irrelevant and prejudicial information, without

any support in the record, and created such a substantial probability of prejudice to petitioner's case, that petitioner was denied his right to a fundamentally fair trial.

For all the foregoing reasons, this Court should affirm the Judgment of the District Court.

Respectfully submitted,

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